UCMJ & FOREIGN CRIMINAL JURISDICTION OVER DEPLOYED PERSONNEL

Lt Col Pete Masciola
HQ MA ANG/JA

JURISDICTION

- UCMJ JURISDICTION
- FOREIGN CRIMINAL JURISDICITON
- INTERNATIONAL CRIMINAL COURT

EG

JURISDICTION

- PROPER JURISDICTION
  - PERSON
  - OFFENSE
- PROPER COMMAND AUTHORITY

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - RULE 201. (a) (2)
    - "THE CODE APPLIES IN ALL PLACES"

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - RULE 202
    - "PERSONS SUBJECT TO THE JURISDICTION OF COURS-MARTIAL"

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - RULE 203
    - "JURISDICTION OVER THE OFFENSE"

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - RULE 204
    - "JURISDICTION OVER CERTAIN RESERVE COMPONENT PERSONNELL"

WHEN DOES IT START?

- UNITED STATES v. CLINE, 29 M.J. 83 (C.M.A. 1983)
  - STATUS, NOT DUTY HOURS, IS CONTROLLING FACTOR
  - MUST LOOK AT ORDERS

CLINE

- ACTIVE DUTY TOUR
- ORDERS SPECIFY PERIOD OF TOUR
- “REPORTING DATE” TO “RELEASE DATE”

CLINE

- BEGINS 0001 ON “REPORTING DATE”
- ORDERS ARE “SELF-EXECUTING”
- MUST BE
  - PUBLISHED, AUTHENTICATED, RECEIVED
- DUTY HOURS, TRAVELING TIMES IRRELEVANT

CLINE

- ENDS 2400 ON “RELEASE DATE”
  OR
  COMPLETION OF TRAVEL

- WHICHEVER IS FIRST!!!!!

COMMAND AUTHORITY

- UCMJ, ARTICLES 22-24
  - GCMCA
  - SCMCA
  - SCCA
- SUPPLEMENTED BY SERVICE REGULATIONS

ADCON/Specified ADCON

Application:

- ADCON and Specified ADCON help to identify those commanders who may exercise UCMJ authority as a matter of Air Force doctrine and policy. This doctrine recognizes that more than one commander may have UCMJ authority over a member in a given situation.

ADCON/Specified ADCON

Application:

- Discipline is also an element of Specified ADCON, which is within the command authority of the COMAFFOR.
- Since disciplinary authority is shared between the commanders holding ADCON and specified ADCON, it is frequently a matter of coordination between the two concerning which one will take disciplinary action. This concept has been codified in AFI 51-202.

ADCON/Specified ADCON

- COURT MARTIAL CONVENING AUTHORITIES MAY BE DIFFERENT THAN COMMANDERS HOLDING ADCON
- CONFUSED?

COURTS-MARTIAL

- 201 MSS/CC PREFERS / COORDINATES CHARGES
  - MOVING TO LOCAL PREFERRALS WITH 201 MSS COORDINATION
- MEMBERS ATTACHED TO HOST WING
  - IF OFFENSE OCCURS ON AN ANG BASE, 201 MSS/CC ATTACHES MEMBER TO NEAREST ACTIVE DUTY WING
- SPCM CONVENING AUTHORITIES
  - 11TH WING, BOLLING AFB, DC
  - 89TH AIRLIFT WING, ANDREWS AFB, DC
  - HOST WING
- GCM CONVENING AUTHORITIES
  - 11TH WING
  - NUMBERED AIR FORCE FOR HOST WING

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - RULE 307
    - "ANY PERSON SUBJECT TO THE CODE MAY PREFER CHARGES"

JURISDICTION

- MANUAL FOR COURTS-MARTIAL
  - CHAPTER IV
  - "FORWARDING AND DISPOSITION OF CHARGES"

JURISDICTION

- “FORWARDING AND DISPOSITION OF CHARGES

  - GCM
  - SPCM
  - SCM

JURISDICTION

- “FORWARDING AND DISPOSITION OF CHARGES

- DISMISSAL OF CHARGES
- FORWARD CHARGES
- REFERRAL OF CHARGES

JURISDICTION

- “FORWARDING AND DISPOSITION OF CHARGES
- GCM ONLY
- REQUIRES ARTICLE 32 PRETRIAL INVESTIGATION

SCENARIO

- RESERVIST/GUARD
- DEPLOYED OVERSEAS
- PROPERLY SUBJECT TO UCMJ
- COMMITS UCMJ VIOLATION

SUPPOSE DISCOVERED AFTER ORDERS END…THE PAST

- RESERVISTS
  - TERMINATION OF FEDERAL STATUS TERMINATED JURISDICTION
- GUARD
  - TERMINATION OF TITLE 10 STATUS TERMINATED JURISDICTION
- HAD TO VOLUNTARILY ACCEPT ORDERS AGREEING TO UCMJ JURISDICTION

OFFENSE DISCOVERED AFTER ORDERS END

- COMPLETE SEPARATION (valid discharge, final pay, final outprocessing) STILL TERMINATES JURISDICTION
- STILL IN RESERVES--ART. 3, UCMJ
  - TEMPORARY BREAK IN SERVICE NO LONGER DEFEATS JURISDICTION
  - STATUS AT TIME OF OFFENSE CONTROLS

RECALL

- ARTICLE 2(d), UCMJ
  - CAN BE INVOLUNTARILY RECALLED TO A.D.
    - ARTICLE 32
    - ARTICLE 15 - Restricted by AFI 51-202
    - COURT-MARTIAL
- APPLIES TO RESERVE & GUARD

WHO CAN RECALL?

- AFI 51-201
  - GCMCA OF REGULAR COMPONENT UNIT FOR TRAINING PURPOSES
  - GCMCA OF REGULAR COMPONENT UNIT WHERE OFFENSE OCCURRED
  - GCMCA OF REGULAR COMPONENT UNIT DESIGNATED IN HOST-TENANT AGREEMENT

WHAT SENTENCE?

- GCMCA CAN RECALL IF NO RESTRICTIONS ON LIBERTY ARE SOUGHT

- IF CONFINEMENT OR RESTRICTION SOUGHT - SEC. OF A.F. MUST APPROVE RECALL

EXTENSION OF ACTIVE DUTY TOUR

- AFI 37-128 - AFI 36-8001 - CONTINUATION OF ORDERS
- ACTION WITH “A VIEW TOWARD TRIAL”
  - APPREHENSION
  - RESTRAINT
  - PREFERRAL OF CHARGES
  - MERE INVESTIGATION NOT ENOUGH

ANOTHER WAY TO EXTEND

- AWOL/DESERTION
  - U.S. v. Wilson, 53 M.J. 327 (2000)
  - Unauthorized absence suspends the termination date of active duty orders until apprehension

COMPLICATED CASES

- RESERVISTS
  - CHECK FOR NEXT ACTIVE DUTY TOUR
- OTHER CASES, INCLUDING GUARD & RESERVIST PERFORMING UTA OR IDT, RECALL TO ACTIVE DUTY

MCM CHANGES

- 2001 Authorization Act
- DUI
  - Incorporates State BAC Limits vs .10
  - O'CONUS & Dual States: SecDef Determines
- Death Penalty
  - 12 Member Panel
  - Effective for Offenses After 31 Dec 02

MCM CHANGES--Details

- New jurisdictional max for SPCMs
  - *1 Year Confinement*
  - 3 Months Hard Labor w/o Confinement
  - 2 Months Restriction to Specified Limits
  - *Forfeiture of 2/3 Pay Per Month for 1 Year*
    - *Forfeiture of any pay may not exceed 1 year*
  - *Fine Not to Exceed Authorized Forfeitures*
  - BCD
  - Reduction to E-1

MCM CHANGES--Details

- Added discussion of actionable adulterous conduct
  - Directly Prejudice Good Order and Discipline or
  - Service Discrediting

ADULTERY: FACTORS TO CONSIDER

- **Accused marital status, rank, position**
- **Co-actor's marital status, rank, position, relationship to the armed forces**
- **Spouses' military status/relationship to the armed forces**
- **Impact on performance of duties**
- **Misuse of government time/resources**
- **Persistence despite counseling**
- **Notoriety/flagrancy**
- **Other offenses**
- **Negative impact on unit**
- **Legal separation**
- **Recent vs. remote in time**

CHANGES IN NJP

- New AFI 51-202 (1 Jul 02)
  - Significantly broadens the definition of “commander”
  - Clarifies the application of NJP in a joint force

STATUS OF DISCIPLINE

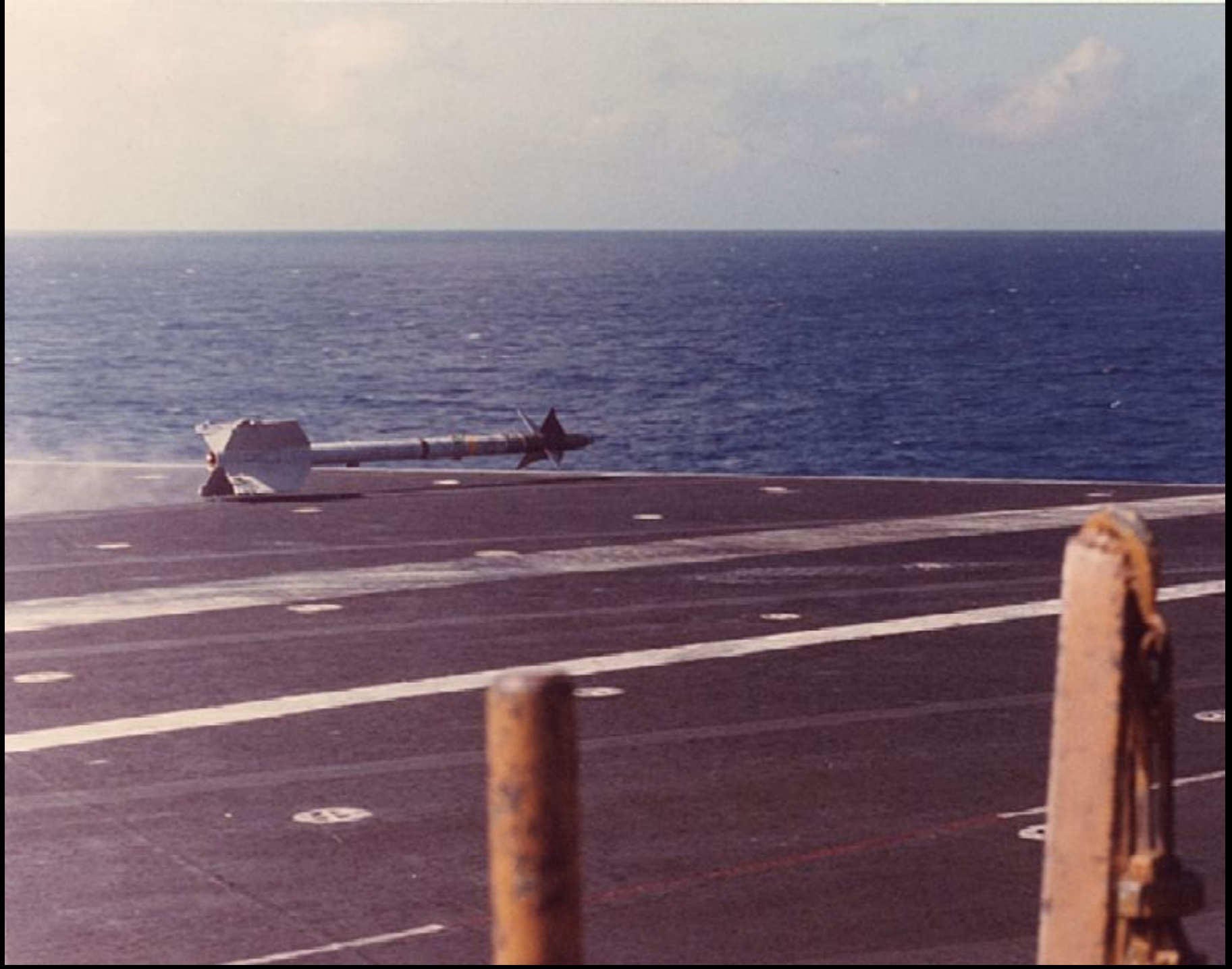
- **COURTS-MARTIAL ACTIONS SINCE 9/11**

- **AD (84)**
- **ANG (25)**
- **AFRC (10)**

STATUS OF DISCIPLINE

- ARTICLE 15 ACTIONS

- AD (700)
- ANG (75)
- AFRC (31)



FOREIGN CRIMINAL JURISDICTION

- General rule: Host State has jurisdiction over persons within its borders
- Exceptions:
  - Diplomatic Immunity (Full/Administrative and Technical ((A&T))
  - UN Missions
  - Basing Agreements

UNITED NATIONS MODEL SOFA AGREEMENT FOR PEACE-KEEPING OPERATIONS

- Privileges and immunities granted to UN personnel as experts on mission and associated personnel
- Grants exclusive jurisdiction to sending country
- Only applies to country of UN operation
- Must have separate arrangement with transit or staging country

NATO SOFA ARRANGEMENT

- Exclusive Jurisdiction - Sending State
  - Violate law of Sending but not Host State
- Exclusive Jurisdiction - Host State
  - Violate law of Host but not Sending State
- Concurrent Jurisdiction
  - Violate law of both Host & Sending State
  - Generally, Host State retains jurisdiction unless exception granted

INTER SE EXCEPTION

- U.S. has primary jurisdiction over personnel who commit crimes against:
  - Military personnel
  - Civilian component
  - Dependents

- ***Short*** case - Netherlands & Capital Punishment

OFFICIAL DUTY EXCEPTION

- U.S. has primary jurisdiction over personnel who commit crimes which arises from any act or omission done in the performance of duty.
- Official Duty?
  - Status of Actor
  - Act related to duty being performed
    - Driving to and from Work?
    - Italian Cable Car Accident
    - Okinawa Rape cases

WAIVER OF PRIMARY JURISDICTION

- "Sympathetic Consideration" to requests
  - Non-Official Duty cases - TJAG & OSD approval
  - Official Duty cases - White House approval
    - *Girard* Case
      - U.S. Army firing range accident
      - U.S. waived jurisdiction
      - Prompted Presidential Policy Letter - Eisenhower

WAIVER OF HOST NATION EXCLUSIVE JURISDICTION

- U.S. Policy -- ALWAYS attempt to obtain waiver or decision by host nation not to exercise jurisdiction.

- Must provide host nation with alternatives that will be suitable under U.S. law or service regulations.

PRETRIAL CUSTODY

- U.S. Policy - Seek immediate release
  - U.S. pretrial confinement only when:
  - Compelled by Treaty
  - Host nation requests
  - Necessary to ensure member's presence at foreign criminal proceedings

INTERNATIONAL HOLD

- Each base should have own procedures developed in conjunction with host nation
  - Military personnel sign notification of policy
  - Civilians asked to sign notification of policy (cannot take their passports)
- U.S. will not help accused evade jurisdiction
- No requirement to “hold” witnesses

EXPIRATION OF ENLISTMENT

- U.S. law prohibits involuntary extension for foreign prosecutions; member must consent

- Subtle Pressure?
  - If member refuses voluntary extension - U.S. must notify host nation

RETURN TO FOREIGN COURTS

- U.S. military personnel may be returned to Host nation to face trial

- Philippines Rape case--Williams v. Rogers
- German Rape case--Holmes v. Laird

INVESTIGATIVE SUPPORT

- U.S. & nearly all allies have agreements which provide for:
  - Investigative Support
  - Handing over accuseds & evidence to Host nation

MILITARY LEGAL ADVISORS

- AFI 51-703 - MLA (usually ADC) duties:
  - Explain foreign criminal system
  - Rights during case
  - advocates/communicates with:
    - CC, local prosecutor, claims officer, trial observer, SJA, other U.S. officials involved.

TRIAL OBSERVERS

- AFJI 51-706(AR 27-50) - must attend every hearing for personnel, civilian component or dependent, unless offense is “minor”
- Not “minor” if:
  - Serious personal injury
  - Extensive property damage
  - Sentence to confinement possible

TRIAL OBSERVERS

- Report - 14 days after trial
- Used by CC to determine if accused received fair trial in accordance with SOFA and host country law.
  - T.O.’s opinion in cover letter - not report

COUNSEL FEES

- Authorized by 10 U.S.C. 1037
  - Includes civilian component & dependents
- When?
  - Confinement -Denial of rights appeal
  - Official Duty -Admin discharge basis
  - Death-High visibility case

PRISON VISITS

- Monitored by Legal Office
  - Problems and complaints
  - Initial visit within 30 days
  - Unit Rep every 30 days thereafter (should periodically include Doctor & Chaplain)
- Report submitted to CC

PRISON TRANSFER PROGRAM

- Authorizes U.S. citizens to serve sentences in U.S. if:
  - Six or more months confinement
  - No appeals pending
  - Agreement provides for such transfer
- Prisoner must request transfer

REQUIRED REPORTS

- Annual FCJ Report to TJAG through DCO
- Confinement Reports
- Trial Observer Reports
- Visitation Reports
- Report when Host nation exercises jurisdiction over U.S. personnel/dependents

REQUIRED REPORTS

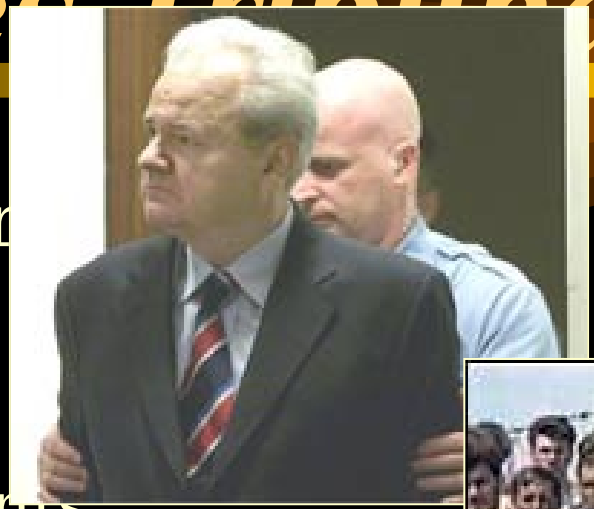
- Serious Incident Reports
  - Foreign pretrial confinement
  - Mistreatment by foreign authorities
  - Adverse publicity to U.S.
  - Jurisdictional questions
  - Death of foreign national
  - Capital cases
- WHEN IN DOUBT - REPORT IT

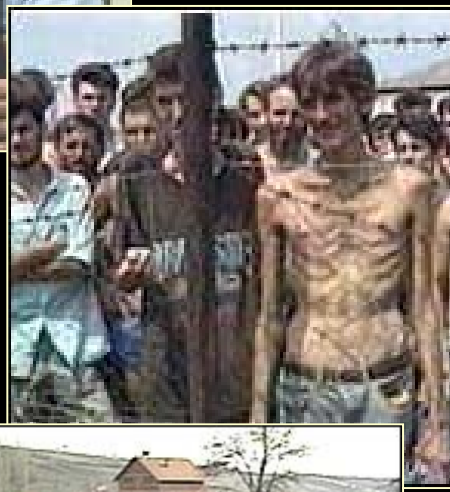
UNIVERSAL JURISDICTION

- Nuremberg, Tokyo War Crimes Tribunals
- “Pinochet Precedent”
- ICTY; ICTR; Sierra Leone; Cambodia
- Belgium Hearings
  - Sharon
  - Kissinger

International War Crimes Tribunals

- ICTY
  - 78 Indictees Appear
    - 34 tried (5 NG)
    - Others in trial
    - 76 current indictments
    - 24 remain at large
  - Milocevic Case
    - Kosovo case-in-chief comple
    - Bosnia, Croatia began 26 Se





International War Crimes

- ICTR
  - 11 completed cases
  - 64 cases pending
  - 11 indictees at large
  - Former Rwandan Prime Minister Jean Kambanda convicted of
  - 11 former Rwandan ministers
- Sierra Leone
  - UN-assisted domestic war crimes tribun

International Criminal Court

- Rome Treaty
- Signed by President Clinton on 31 December 2000
  - US Withdrawal – 6 May 2002
- Came into existence on 1 July 2002
- Complementarity
- Jurisdiction over:
  - Genocide
  - Crimes of humanity
  - War crimes
  - Crime of aggression – when defined
  - Future Crimes

ICC: US Position

- Fear of political prosecutions
  - Independent Prosecutor vs UNSC
- Jurisdiction over citizens of non-signatory States
- Exemption of Signatory-states from future crimes
- SOFA Issues – Art. 98 Process
- Future of US Peacekeeping Efforts Threatened

American Service Me Protection Act

- Became law July 2002
- Military personnel may not participate in UNPKOs or peace enforcement ops created after 1 Jul 02 unless either the UN grants permanent immunity from ICC jurisdiction to US military personnel or the host nation has either signed an Art 98 agreement with the US or has not invoked jurisdiction of the ICC pursuant to Art 12.

American Service Members Protection Act

- Effective 1 Jul 03, the US may not provide military assistance to a country that is a party to the ICC.
  - Includes foreign military sales, E-IMET, etc
- Congressional exemption for NATO, Argentina, Australia, Egypt, Israel, Japan, Jordan, Korea, New Zealand & Taiwan
- Presidential waiver possible
  - Art 98 agreement with US
  - National interests

American Service Members Protection Act

- 87 countries have ratified or accepted Rome Treaty (6 Jan 03)
- 14 Countries have agreed to enter into Art 98 agreements with the US
- 7 countries will not enter into such agreements
- 78 countries are considering the issue
- Application to US **MILITARY** personnel only

International Agreements

- US policy—US will pursue Art 98 or other bilateral agreements
- US has 17 Art 98 agreements as of 9 Jan 03:

Afghanistan
Marshall Islands
Dominic
Mauritania
East Timor
Micronesia
El Salvador
Nepal
Gambia
Palau
Honduras
Romania
India
Sri Lanka
Israel
Tajikistan
Uzbekistan

QUESTIONS?